STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 16, 2006
v	No. 258848 Allegan Circuit Court
CLINTON TAYLOR, Defendant-Appellant.	LC No. 03-013413-FC

Before: Meter, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(b), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(b), arising from the sexual abuse of his daughter. Defendant was sentenced to concurrently serve prison terms of 210 months to 30 years for his first-degree criminal sexual conduct convictions, and 100 months to 15 years for his conviction of second-degree criminal sexual conduct. Defendant appeals as of right. We affirm.

According to the victim, the assaults for which defendant was convicted began when she was twelve years old and continued until she was sixteen years old. At trial, the victim explained that the sexual assaults occurred as often as three times per week and involved defendant forcing her to perform and receive oral sex, touching her breast and vaginal areas, and engaging in slight digital penetration of her vagina. The victim testified that although she lied to interviewers on at least two previous occasions by denying that defendant assaulted her, she eventually disclosed the sexual assaults to her stepmother and the police. She also admitted that she wrote a letter recanting her allegations after defendant was charged in the present case, but she explained that she wrote the letter at defendant's request and in his presence, while at the home of a member of the congregation for which defendant was a minister. The victim admitted that she also wrote a message in a card sent to defendant while he was in jail serving his sentence for an unrelated conviction. In the message, the victim proclaimed defendant's innocence and thanked him for saving her from having to testify in that case. The defense introduced this documentary evidence to support its theory that the victim fabricated her allegations against defendant, and also offered testimony to refute that the victim wrote her recantation letter involuntarily.

On appeal, defendant first argues that the trial court abused its discretion when it denied his pretrial motion for a competency evaluation. We disagree.

"A criminal defendant is presumed to be competent to stand trial absent a showing that 'he is incapable because of his mental condition of understanding the nature and object of the proceedings against him or of assisting in his defense in a rational manner.'" *People v Harris*, 185 Mich App 100, 102; 460 NW2d 239 (1990), quoting MCL 330.2020(1). The test to determine competency to stand trial is "whether the defendant 'has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.'" *People v Belanger*, 73 Mich App 438, 447; 252 NW2d 472 (1977), quoting *Dusky v United States*, 362 US 402; 80 S Ct 788; 4 L Ed 2d 824 (1960). The determination whether a competency evaluation is necessary to assess such competency is within the trial court's discretion. *Harris, supra*.

In moving for a competency examination before trial, defense counsel represented that defendant "was not as consistent in his mental processes in terms of talking about issues," and that his mental state had declined in comparison to defense counsel's previous visits. These bare, unsupported allegations do not amount to a showing that defendant was unable to assist in his defense or understand the nature and object of the proceedings. *Id*.; see also *Drope v Missouri*, 420 US 162, 177 n 13; 95 S Ct 896; 43 L Ed 2d 103 (1975) (a trial court is not required to accept without question an attorney's representations concerning the competence of his client). Likewise, defense counsel's indication that defendant was apprehensive and depressed does not equate to a finding that defendant was incompetent to stand trial, or even in need of a competency evaluation. The trial court applied the appropriate statutory criteria for determining competency when it denied defendant's motion and, in doing so, properly concluded that defendant had failed to rebut the presumption of competency. On the record before us, the trial court did not abuse its discretion when it denied defendant's motion for a competency evaluation.

Defendant next argues that he was denied the effective assistance of counsel because defense counsel failed to raise and preserve an insanity defense. Our review of this issue is limited to mistakes apparent on the record because no *Ginther*[1] hearing was held. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). A defendant must overcome the strong presumption that counsel's performance was sound trial strategy. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Decisions regarding what evidence to present are matters of trial strategy, which this Court will not review with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). This Court will not reverse where the failure to raise an insanity defense is a question of trial strategy. See *People v Lotter*, 103 Mich App 386; 302 NW2d 879 (1981).

Defendant has not established that he was denied the effective assistance of counsel. Defense counsel's decision to exploit the inconsistencies between the victim's testimony and her written card and letter, and to present a witness to attack the victim's credibility in an effort to

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

persuade the jury that the victim's allegations of abuse were untrue, was a matter of trial strategy. Because the defense of insanity entails a challenge to criminal responsibility for conduct, rather than the conduct itself, the presentation of an insanity defense would have been entirely inconsistent with that strategy. Although a defendant may present inconsistent defenses, see *People v Lemons*, 454 Mich 234, 245; 562 NW2d 447 (1997), doing so here would have significantly weakened the chosen defense, which, given the victim's initial denial of abuse and her later recantation of the allegations against defendant, was a wholly reasonable strategy. We will not second-guess defense counsel's professional judgment as to trial strategy. See *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). The fact that the strategy chosen by defense counsel did not work does not constitute ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Defendant next challenges the admission of bad-acts evidence during trial. Specifically, he argues that evidence regarding his prior conviction for criminal sexual conduct was inadmissible under MRE 404(b), and that the prosecutor improperly elicited testimony regarding that incident during his case-in-chief, in violation of a trial court order. We review this unpreserved evidentiary challenge for plain error affecting defendant's substantial rights, i.e., error that was outcome-determinative. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003).

Although MRE 404(b) prohibits the introduction of evidence of other crimes, wrongs, or acts of an individual to prove a propensity to commit such acts, it is a rule of inclusion, not a rule of exclusion. *People v Katt*, 248 Mich App 282, 303; 639 NW2d 815 (2001). Evidence of other crimes, wrongs, or acts is admissible under MRE 404(b) if: (1) it is offered for a proper purpose, such as to prove motive, opportunity, or intent, and not to prove the defendant's character or propensity to commit the crime, (2) it is relevant to a fact of consequence at trial, and (3) the danger of unfair prejudice does not substantially outweigh the probative value of the evidence under MRE 403. *People v VanderVliet*, 444 Mich 52, 55, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Where such evidence is admitted the trial court may, upon request, provide an instruction limiting its use by the jury. *Id*. at 75.

Before trial, the prosecution filed a notice of intent to use evidence of other wrongful acts, in particular, defendant's prior conviction for the sexual assault of the victim's friend, pursuant to MRE 404(b). Finding the evidence to be unfairly prejudicial, the trial court ruled that the prosecutor could use the evidence to impeach defendant if he testified, but not in its case-in-chief. When the victim testified, however, the prosecutor questioned her about the case on direct examination, and twice more raised the incident during voir dire of exhibits offered during defense counsel's cross-examination. The prosecutor also questioned the victim about the matter on redirect examination, and questioned the victim's stepmother about it as well. We find that these actions clearly violated the trial court's order prohibiting use of the evidence in the prosecution's case-in-chief.

We also find that the evidence did not meet the requirements for admissibility under MRE 404(b). While the evidence was undoubtedly relevant to a fact of consequence in the present case, and was arguably admissible for a nonpropensity purpose, the trial court determined that the danger of unfair prejudice substantially outweighed the probative value of the evidence under MRE 403. *VanderVliet*, *supra* at 74-75. The trial court's order to that effect has not been appealed, and we are unpersuaded that the trial court's assessment in this regard

was an abuse of discretion. See *People v Bahoda*, 448 Mich 261, 291; 531 NW2d 659 (1995), ("'[r]ule 403 determinations are best left to a contemporaneous assessment of the presentation, credibility, and effect of testimony' by the trial judge"), quoting *VanderVliet*, *supra* at 81. Moreover, the manner in which the evidence was presented supports only a conclusion that defendant had a propensity to sexually abuse young females. Thus, because this is not a proper purpose for admission under MRE 404(b), *VanderVliet*, *supra* at 74-75, and because the trial court properly determined that the evidence was unfairly prejudicial, defendant has demonstrated plain error in the prosecutor's elicitation of the evidence in violation of the trial court order.

However, we find that defendant's substantial rights were not affected by admission of the evidence. *Carines*, *supra*. The trial court gave a limiting instruction regarding how the jury should view the evidence, and specifically instructed that it could not convict defendant of the charged offenses based on his other bad conduct. Juries are presumed to have followed their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Moreover, in prosecutions under MCL 750.520b and 750.520c, the testimony of a victim need not be corroborated, MCL 720.520h, and sufficient evidence was presented at trial to convict defendant for the crimes charged absent the challenged evidence. Reversal of defendant's convictions is not, therefore, required. *Carines*, *supra*.

Defendant next argues that the trial court erred when it denied his motion for a mistrial on the ground that the prosecutor improperly attacked his right to remain silent by arguing to the jury during closing and rebuttal arguments that there was no evidence to dispute or otherwise contradict the victim's claims of sexual abuse.[2] We review a trial court's decision on a motion for a mistrial for an abuse of discretion. *People v Coy*, 258 Mich App 1, 3; 669 NW2d 831 (2003). A trial court should grant a mistrial "only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *People v Ortiz-Kehoe*, 237 Mich App 508, 514; 603 NW2d 802 (1999).

The trial court did not abuse its discretion in denying the motion for a mistrial. A prosecutor may take notice that evidence against the defendant is "uncontroverted" or "undisputed," even if the defendant is the only person who could have disputed the evidence. See *People v Fields*, 450 Mich 94, 115-116; 538 NW2d 356 (1995). When a prosecutor remarks that evidence is undisputed, he is properly arguing the weight of the evidence. *People v Guenther*, 188 Mich App 174, 177; 469 NW2d 59 (1991). Here, we note that the prosecutor followed the challenged statements by discussing the evidence and arguing that the victim's testimony was worthy of belief. Moreover, the contested rebuttal statements were a fair and proper comment on arguments advanced by defense counsel during his closing argument. A prosecutor's closing argument may not shift the burden of proof by commenting "on a defendant's failure to testify or present evidence." *People v Abraham*, 256 Mich App 265, 273;

[2] Although defendant also argues that testimony regarding a Family Independence Agency investigation violated his Sixth Amendment right to confrontation, he has abandoned appellate review of this issue because he failed to raise it in his statement of questions presented, as required by MCR 7.212(C)(5). *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000).

662 NW2d 836 (2003). However, a prosecutor is entitled to fairly respond to issues raised by a defendant. *People v Jones*, 468 Mich 345, 352-353 n 6; 662 NW2d 376 (2003). The extent of the prosecutor's leeway to respond depends on the defense asserted, but the prosecutor is entitled to point out weaknesses and improbabilities in the defendant's case. *Fields*, *supra* at 115-117. During closing argument, defense counsel repeatedly argued that the victim fabricated her testimony and was truthful only when she previously denied any abuse. The prosecutor's rebuttal statements were a fair and proper response to this argument.

Defendant next challenges the trial court's refusal to admit a recorded telephone conversation between defendant and the victim, during which the victim acknowledged that she had never been "hurt" or otherwise made to feel "uncomfortable" by defendant. The trial court denied admission of the recording on the grounds that its nondisclosure by the defense until the first day of trial violated the mutual discovery order in place, and because the probative value of the recording was outweighed by its cumulative effect. MRE 403. Defendant argues that the recording was relevant and probative evidence and that its suppression precluded him from presenting his defense at trial. We review a trial court's decision regarding the appropriate remedy for noncompliance with a discovery order and regarding the admissibility of evidence for an abuse of discretion. *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997); *Katt*, *supra* at 289. However, questions of law related to the admission or exclusion of evidence, including a claim that the defendant was denied his constitutional right to present a defense, are reviewed de novo. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001).

In criminal proceedings a party must, if requested, provide "any written or recorded statement by a lay witness whom the party intends to call at trial." MCR 6.201(A)(2); see also *People v Holtzman*, 234 Mich App 166, 174; 593 NW2d 617 (1999). Where a party fails to do so, a trial court may order that testimony or evidence be excluded, or may order another remedy. See MCR 6.201(J). Although an abuse of discretion is a high standard that is difficult to overcome, see *People v Ackerman*, 257 Mich App 434, 437-438; 669 NW2d 818 (2003), otherwise admissible evidence should only be excluded in the most egregious cases, *People v Taylor*, 159 Mich App 468, 487; 406 NW2d 859 (1987). To fashion a remedy, "the court must 'determine the legitimate interests of the court and the parties involved and how they may be affected by the remedial choices available.'" *People v Clark*, 164 Mich App 224, 229; 416 NW2d 390 (1987), quoting *People v Taylor*, 159 Mich App 468, 484; 406 NW2d 859 (1987). This discretion requires an inquiry into all the relevant circumstances, including the causes of the noncompliance, as well as a showing by the objecting party of actual prejudice. *Davie*, *supra* at 598.

The trial court's suppression of the recording did not constitute an abuse of discretion. The trial court considered the circumstances and the effect of its ruling on the parties. The prosecution had already received discovery materials after the deadline, and the defense previously engaged in delaying tactics. Moreover, the recording at issue was not mentioned to the prosecution until the middle of the victim's cross-examination. The trial court thus had legitimate reasons for excluding the recording from trial on the basis of a discovery violation.

The trial court also properly denied admission of the recording under the rules of evidence. The recorded phone conversation was relevant to the present case because it contains the victim's denial that defendant had ever touched her sexually. MRE 401. While relevant evidence is generally admissible unless otherwise precluded, MRE 402, relevant evidence may

be excluded if it is cumulative evidence. MRE 403. The record supports the trial court's conclusion that the recording's contents were cumulative in nature. The recording served the same impeachment purpose as the previously admitted letter. Further, the probative value of the recording was limited because, although explaining that she did so only because she was frightened, the victim admitted at trial that she participated in telephone conversations with defendant during which she acknowledged that defendant never "hurt" or made her feel "uncomfortable." It was not an abuse of discretion to preclude the evidence.

Defendant next challenges his imposed sentences on several grounds. First, defendant argues that the trial court erred in scoring offense variable (OV) 10, MCL 777.40, at fifteen points and OV 19, MCL 777.49, at ten points. Defendant preserved these issues for appeal by objecting to these scores at his sentencing hearing. MCR 6.429(C). A sentencing court has discretion in determining the number of points to be scored under an offense variable, provided that evidence on the record adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Although we review the trial court's factual findings at sentencing for clear error, we will uphold the trial court's scoring of the sentencing guidelines if there is any evidence in the record to support it. *Id*.; *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003).

MCL 777.40(1)(a) provides that fifteen points should be scored for OV 10 if "[p]redatory conduct was involved." Predatory conduct is defined as "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). The evidence presented at trial supported a finding of predatory conduct. Indeed, the evidence demonstrated that defendant planned his assaults on the victim while her stepmother was not at home. He called her into his bedroom and assaulted her there, and locked the victim's siblings out of the house during the assaults. He also prepared the victim for sexual activity with pornographic videos and magazines, and sexually oriented toys. The record also demonstrates that defendant used the sexual encounters as a way to exert control over the victim. Because the prosecutor presented evidence of preoffense conduct directed at the victim for the purpose of victimization, the trial court did not err in scoring fifteen points for OV 10.

Ten points may be scored for OV 19 if "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49(c). The trial testimony supported that a member of defendant's congregation took the victim to a home belonging to other congregation members and that, at that home, the victim wrote a letter recanting her allegations against defendant. Defendant was present at the time, and the letter was written at his direction. A congregation member subsequently took the letter to an attorney and hired that attorney to represent the victim. This attorney was later substituted as defense counsel, but was ultimately removed from the case for a conflict of interest. Defendant's bond was revoked after the victim's March 2004 testimony about writing the letter, because his interaction with the victim violated a no-contact order. The victim additionally testified that defendant attempted to bribe her to recant her allegations against him. Because this evidence supports that defendant attempted to interfere with the administration of justice by impacting the victim's testimony, we affirm the scoring of ten points under OV 19.

In reaching this conclusion, we reject defendant's argument that he is entitled to resentencing pursuant to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). In *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004) our Supreme

Court held that *Blakely* is inapplicable to Michigan's sentencing scheme, and this Court, in *People v Drohan*, 264 Mich App 77, 89 n 4; 698 NW2d 750 (2004), rejected the argument that *Claypool* is merely dicta and is not binding on this Court. We are bound by these precedents.

Additionally, we reject that defendant's sentences constitute cruel and unusual punishment. Because defendant's sentences are within the applicable guidelines range, they are proportionate, and defendant's argument that his sentences constitute cruel and unusual punishment necessarily fails. *McLaughlin*, *supra* at 670-671; *Drohan*, *supra* at 91-92. Moreover, under MCL 769.34(10), if a minimum sentence is within the appropriate sentencing guidelines range, we must affirm the sentence and may not remand for resentencing absent an error in the scoring of the guidelines or inaccurate information relied upon in determining the sentence. *People v Kimble*, 470 Mich 305, 309-311; 684 NW2d 669 (2004).

Next, in his brief filed in propria persona pursuant to Standard 4 of Administrative Order 2004-6, defendant asserts several additional instances of prosecutorial misconduct. We have reviewed the numerous alleged instances of misconduct and find each to be without substantive merit. Defendant has not demonstrated the existence of prosecutorial misconduct requiring reversal. Additionally, because defense counsel is not required to make futile objections, we reject defendant's claim that his trial counsel provided ineffective assistance by failing to object to these alleged instances of prosecutorial misconduct. See *People v Wilson*, 252 Mich App 390, 397; 652 NW2d 488 (2002).

Defendant additionally argues that there was insufficient evidence to support his convictions. Although defendant frames the issue a challenge to the sufficiency of the evidence, his argument constitutes a challenge to the verdict on the great weight of the evidence. He does not argue that the prosecutor failed to establish any of the elements of either first- or second-degree criminal sexual conduct, which is required to successfully challenge the sufficiency of the evidence. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). Rather, he argues that his convictions were based on the victim's allegations, which could not reasonably be believed.[3] Because defendant did not preserve this issue by raising it in a motion for a new trial pursuant to MCR 2.611(A)(1)(e), we review it under the plain error standard. *People v Noble*, 238 Mich App 647, 658; 608 NW2d 123 (1999); *Carines*, *supra* at 763.

The appropriate test for determining whether a verdict is against the great weight of the evidence "is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). It is well-established that this court "may not attempt to resolve credibility questions anew." *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). Therefore, "absent exceptional circumstances, the issues of witness credibility are for the jury, and the trial court may not substitute its view of credibility for the constitutionally guaranteed

[3] In support of his argument, defendant also claims that the allegations against him were not witnessed or known by anyone else. However, "it is a well-established rule that a jury may convict on the uncorroborated evidence of a [criminal sexual conduct] victim." *Lemmon*, *supra* at 643 n 22.

jury determination thereof." *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998) (citation and internal quotation marks omitted). The narrow exceptions to the general rule against granting a new trial based on witness credibility questions include instances where witness "testimony contradicts indisputable facts or laws," when it is "patently incredible or defies physical realities," is "so inherently implausible that it could not be believed by a reasonable juror," or has been "seriously impeached" in a case marked by "uncertainties and discrepancies." *Id*. at 643-644. "If 'it cannot be said as a matter of law that the testimony thus impeached was deprived of all probative value or that the jury could not believe it,' the credibility of witnesses is for the jury." *Id*. at 643, quoting *Anderson v Conterio*, 303 Mich 75, 79; 5 NW2d 572 (1942). Defendant has failed to demonstrate that the victim's testimony was patently incredible, inherently implausible, or contrary to physical realities. The jury had the opportunity to observe the victim and form an opinion about her credibility. Consequently, we will not interfere with the jury's credibility determination. *Lemmon*, *supra* at 642-643.

Finally, because such motion would, as discussed above, have been meritless, defendant was not denied the effective assistance of counsel when his trial counsel failed to raise and preserve a motion for a new trial based on a claim that the jury's verdict was against the great weight of the evidence. "Ineffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion." *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003).

Affirmed.

/s/ Patrick M. Meter
/s/ Joel P. Hoekstra
/s/ Jane E. Markey